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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 123

AMERICAN FINISHING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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American Finishing Company, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit entered in the above entitled cause, enforcing against Petitioner an Order of the National Labor Relations Board.

OPINIONS BELOW

The Opinion Below (App. B, p. A4, infra), is reported at ..... F. 2d ....., entered on March 4, 1968, Docket Number 17,568.

The Decision and Order of the National Labor Relations Board in the unfair labor practice case is reported at 159 NLRB 976; the Board's Decision in the Representation case, which forms part of the record here, appears at J. A. 193a[1]

JURISDICTION

The Court Below entered its Judgment on March 4, 1968 (App. B, p. A4, infra), and denied a Petition for Rehearing on April 3, 1968 (App. C, p. A5, infra). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does the National Labor Relations Board have the power to determine that an employee is not a supervisor where the employee admittedly has been delegated supervisory authority, within the meaning of the Act, and where the employee admittedly has exercised such authority?

2. Is the unit, as determined by the Board, an appropriate unit under the Act?

3. Is the collective bargaining agreement, signed January 14, 1963, between American Finishing Company and Textile Workers Union of America, AFL-CIO (which is still in force and effect) a bar to the petition of Machine Printers and Engravers Association of the United States?

STATUTORY PROVISIONS INVOLVED

This case arises under the National Labor Relations Act, as amended (6 Stat. 136, 29 U.S.C., Sec. 141, et seq.), hereinafter called the "Act." The pertinent provisions of the Act involved are set forth in Appendix A, p. A1, infra.

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1. J. A. refers to the Joint Appendix filed by the Board and Petitioner in the Court of Appeals.

STATEMENT OF THE CASE

On March 29, 1965, Machine Printers and Engravers Association of the United States, hereinafter referred to as the "Union", filed a petition with the United States National Labor Relations Board. The unit as proposed by the Union includes "All journeymen machine printers and their apprentices in the printing department at the Employer's Memphis, Tennessee plant" and excluded "All other employees, watchmen, guards, and supervisors as defined in the Act". Petitioner did not then nor does it now employ journeymen machine printers or apprentices.

Upon the hearing of the petition and at every proceeding thereafter, Respondent contended (1) that all of the employees in the proposed unit were supervisors as defined in the Act, (2) that the proposed unit was inappropriate, and (3) an existing contract between Respondent and Textile Workers Union of America, AFL-CIO was a bar to the petition of the Union.

On January 15, 1963, an Agreement was signed and consummated by and between American Finishing Company and Textile Workers Union of America, AFL-CIO, which Agreement was effective as of the 15th day of January, 1963, and was to continue in full force and effect until the 15th day of January, 1965. Said Agreement was modified and extended on June 28, 1964, and is in effect (J. A. 34a). Said Agreement covers all employees of the Respondent, excluding watchmen, main office employees, plant secretaries, office workers, laboratory employees other than those classified as coating laboratory technicians, pump man, mixer, evaporator man, or dish washer, and excluding persons in executive positions with final authority to hire or discharge, and excluding all other supervisory employees with authority to hire, promote, discharge, dis-

cipline or otherwise effect changes in the status of employees or effectively recommend such action.

All of the employees in the proposed unit work in the printing department and are supervisors within the meaning of the Act. There are only 8 employees in the proposed unit and all of them are assistant foremen.

The printing department of the Petitioner is completely integrated with the other departments of the American Finishing Company and cannot be operated without the proper functioning of many other departments at the American Finishing Company (J. A. 42a, 43a, 51a, and 52a).

The Petitioner employs approximately 770 employees (J. A. 53a).

All of the other assistant foremen at the American Finishing Company are conceded by everyone to be supervisors within the meaning of the Act. All of the other assistant foremen and all of the assistant foremen in the printing department are paid on an hourly basis, receive the same hospitalization and life insurance benefits, use the same eating facilities, receive time and a half for work over 40 hours, receive the same vacations, receive no pay for holidays or sick leave (J. A. 65a, 66a, 67a), and all are working foremen (J. A. 68a). The eight employees sought to be represented are all designated assistant foremen, regardless of their experience in the printing department. These eight employees have the same supervisory authority and duties as the other assistant foremen at American Finishing Company.

For many years Petitioner has distributed every six months to the assistant foremen at the Company, including the assistant foremen in the printing department (J.

A. 38a, 39a, Employer's Exhibit No. 2, J. A. 171a), a written memorandum entitled "Assistant Foremen's Right to Hire and Fire".

The Record shows that as a result of the necessity of using untrained personnel, of the Petitioner's policy of employing unskilled employees, and for other reasons, the Petitioner has set up a personnel organization which provides for a great number of supervisors throughout its plant, resulting in a high supervisory ratio (J. A. 36a, 37a, and 39a). The Record shows that Petitioner has 134 supervisors out of a total of 770 employees (J. A. 53a). The whole plant has been set up on this type of organization for many years and all foremen and assistant foremen have been excluded from the contract with the Textile Workers Union of America, AFL-CIO, because they were supervisors (J. A. 39a). The printing department of the Company was set up and still is set up on the same organizational basis as all of the other departments at the plant of Respondent.

American Finishing Company's plant is located many miles from the textile area. It is in an area where there is a scarcity of experienced people to do the jobs at American Finishing Company. Petitioner, in the exercise of its *managerial discretion*, organized its plant and operation different from that of the companies which operate in the textile districts. Petitioner does not generally discipline employees, whether in the supervisory group or in the bargaining group of the TWUA, by laying them off, fining them, or cutting their wages, or docking them. Petitioner reprimands them and tries to instruct them as to what to do to avoid making the same mistakes again, and to rely on the fact that it has a much larger supervisory group than the normal finishing plant. Petitioner counts

on its superintendents, foremen, and assistant foremen to get the job done with the people they have to do it with, or to let them go and to get other people. Petitioner counts on its supervisors, and as a matter of policy, does not have the normal docking, fining and lay-off system that prevails to a large extent elsewhere in this industry (J. A. 151a and 152a).

Frank Fry, Superintendent of Petitioner's printing department, testified that the assistant foremen have the power, and have exercised it, to discipline and reprimand the backhelp or the inspectors (J. A. 93a). He testified the assistant foremen maintain order in their work area and they are the boss, and are solely responsible for their machine and their back-tenders and inspectors (J. A. 70a). He testified applicants have been employed solely on the recommendation of the assistant foremen, and employees have been terminated solely by assistant foremen without consulting anyone (J. A. 92a). He testified the assistant foremen have the power and authority and it is one of their duties to transfer backhelp from one machine to another (J. A. 93a); when an infraction of a rule occurs, the assistant foreman can recommend disciplinary action or take direct action on their own (J. A. 96a); that if the backhelp want time off, the assistant foremen have the authority to grant it (J. A. 95a). Fry's testimony was uncontradicted and unimpeached and no contradictory evidence was introduced. In 1960 (Employer's Exhibit No. 7, J. A. 183a) and again in 1961 (Employer's Exhibit No. 5, J. A. 181a) grievances were filed against some of these eight assistant foremen on the basis they were supervisors performing production work. Also, until very recently these eight assistant foremen were the first step in the grievance procedure set up in the TWUA contract with full authority to adjust grievances on behalf of the Petitioner.

In the contract negotiations, Textile Workers Union of America, AFL-CIO, stated and agreed that the assistant foremen in charge of the printing machines were supervisors and were excluded from the contract (J. A. 42a and 49a). These foremen were required to get out of the Textile Workers Union of America, AFL-CIO (J. A. 40a, 56a and 58a) immediately upon becoming such foremen. See Employer's Exhibit 3(a), (b), (c), (d) and (e) (J. A. 176a). No one contradicted this evidence.

William Huffstatler testified that when he was President of Textile Workers Union of America, AFL-CIO, Local 643, in 1959 and 1960, the Union during the contract negotiations negotiated for everybody covered under the bargaining agreement except the ones excluded, and the Union excluded assistant foremen in the printing department because they were supervisors, and the Union has not changed its position on that point (J. A. 55a and 66a). This was uncontradicted and unimpeached.

Mr. Huffstatler testified that during a strike by the Textile Workers Union of America, AFL-CIO, at American Finishing Company in July, 1959, the Union pickets allowed the assistant foremen in the printing departments to cross the picket lines because they were supervisors (J. A. 55a). He named six men, who were assistant foremen in the printing department in 1959, and who are still such assistant foremen, who were allowed to cross the picket line in July, 1959, as supervisors (J. A. 55a and 56a). None of the six nor anyone else contradicted this evidence.

Eric Lindberg, the President of the Union, on direct examination, testified at great length of his great knowledge and experience in the textile printing industry. On cross-examination, Mr. Lindberg testified that he did not know

whether there would have to be some foreman somewhere in the plant over the inspector. In answer to the question, "do the inspectors need a supervisor over them?", he answered, "I don't know that. That is the prerogative of management to decide that. Who needs to be the inspector (sic supervisor) over the inspector, I don't know that" (J. A. 119a). On the same page he said he did not know who has to be the supervisor over the inspector and answered that it is the prerogative of management. He also testified: "The company has a right to do what they elect to do" (J. A. 119a). He testified that management has the right to make printers supervisors and give them supervisory duties (J. A. 120a). He testified *he had never been in the American Finishing Company* (J. A. 115a), and *"I don't know anything about their plant"* (J. A. 120a). Mr. Lindberg testified he had never heard of an *inexperienced* man or one with *no training* in the operation of a printing machine or department *being placed in charge of a printing machine as is the case at American Finishing Company* (J. A. 119a).

Mr. Lindberg testified that in 1948 or 1949 his Union petitioned for an election at American Finishing Company and the Board directed an election, which the Union won, and American Finishing Company refused to bargain with the Union; he testified that the Petitioner was then represented by Mr. Lawrence Hogan, an attorney who is now retired. He testified that he consulted with Mr. Hogan and with Mr. Warren Woods, attorney, regarding whether or not refusal to bargain charges should be filed, and Mr. Hogan's advice was not to file charges for refusal to bargain because of the *Ohio Power Company* case (J. A. 112a). The Ohio Power Company case is cited as *Ohio Power Company* v. *NLRB*, 176 F. 2d 385 (6th Circuit Court of Appeals—cert. denied).

The proposed unit would include only eight employees out of a total of approximately 770 employees of Petitioner.

The printing department of Petitioner is completely integrated with the remainder of Petitioner's plant, and the printing department cannot operate by itself (J. A. 42a, 43a, 51a, and 52a).

Petitioner has set up its operation different from that in the textile districts (J. A. 152a).

Petitioner has no apprentice program. Petitioner has no journeyman and apprentice set-up. The duties, responsibilities, authority, and rights of the assistant foremen in the printing department of Petitioner are the same whether they have worked one year or seven years (J. A. 75a, and 76a) and are derived from management and not from the nature of their employment.

Mr. Eric Lindberg, the President of the Union, testified that the foremen in every print works where the Union has a contract is a member of the Union. In response to a question by the Hearing Officer, Mr. Lindberg testified that the foreman is legally not covered by the contract, but technically is covered by the contract which the Union has with all of the various employers (J. A. 116a and 117a). A reading of Union's Exhibit 3 (J. A. 186a), which is the agreement with all of the companies where the Union has contracts, definitely discloses that the agreement covers journeymen, apprentices, foremen and assistant foremen, all of whom comprise the appropriate unit. Certainly under the Act a unit which includes journeymen who Mr. Lindberg concedes to be supervisors and apprentices, foremen and assistant foremen is an inappropriate one.

Under the contract with Textile Workers Union of America, AFL-CIO, the bargaining unit is all employees of Petitioner at its plant in Memphis, Tennessee, excluding watchmen, main office employees, plant secretaries, office workers, laboratory employees other than those classified as coating laboratory technicians, pump man, evaporator man, or dishwasher, and excluding persons in executive positions with final authority to hire or discharge, and excluding also all other supervisory employees with authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action. Employer's Exhibit No. 1 (J. A. 166a). The contract covers the Printing Department, which was designated N Department (J. A. 167a), and therefore if these eight assistant foremen are found not to be supervisors within the meaning of the Act, then they are covered by the Textile Workers Union of America contract.

REASONS FOR GRANTING THE WRIT

The Court below adopted and approved the Board's concept that inasmuch as machine printers in the balance of the industry are not supervisors, the printers at the Petitioner's plant cannot and are not supervisors. The Court below approved the Board's disregard of supervisory authority of the nature specified in Section 2(11) of the Act which was shown without dispute to have been in fact delegated and in fact exercised.

Moreover, the Decision of the Court below affirming the Board's concept that supervisory authority of the nature specified in Section 2(11) of the Act, when not exercised by the employee to whom it was admittedly delegated and who actually exercised same, with sufficient

frequency to satisfy the Board, constitutes an additional requirement not embodied in the statutory definition of "supervisor" in Section 2(11) of the Act, as amended. The Decision of the Court Below is in direct conflict with its own decision in *Ohio Power Company* v. *NLRB,* 176 F. 2d 385 (cert. denied) 338 U.S. 879; and the Decision of the Court of Appeals for the First Circuit in *Leland Gifford* v. *NLRB,* 200 F. 2d 620. The *Ohio Power Company* case and the *Leland Gifford* case clearly held that the *existence* of supervisory authority *rather than its exercise* is controlling in determining whether an employee is a supervisor within the meaning of the Act. The Court of Appeals for the Sixth Circuit held in *Ohio Power Company* v. *NLRB,* 176 F. 2d 385, 387, 388, as follows:

> "The Board also erred as a matter of law in considering the test of the performance of supervisory duties to be the frequency of their exercise. It said in its amended decision: 'Assuming, arguendo, that the control operator does perform "supervisor" duties in major and minor emergencies, such as described hereinabove, in the Respondent's offer of proof, this sporadic and infrequent exercise of authority is insufficient to invest him with the "supervisory cloak contemplated in the amended Act."' . . ."
>
> "Section 2(11) covers any individual 'having authority . . . responsibly to direct . . .'. It does not require the exercise of the power described for all or any definite part of the employee's time. It is the existence of the power which determines the classification. That power responsibly to direct exists here is uncontradicted . . ."

To like effect, the Court of Appeals for the First Circuit held in *NLRB* v. *Leland Gifford Co.,* supra:

> ". . . We think the statute *does mean* that once an individual has actually been clothed with genuine

> power to perform a supervisory function, he thereupon becomes a 'supervisor', even before an opportunity arrives to exercise his power, and even though he may not often find it necessary to exert the power conferred. That is to say, one clothed with real power to discipline other employees, for instance, would be ipso facto a 'supervisor', even though in a particular instance months, or perhaps in rare cases even years, might pass before any occasion ever arose calling for an exercise of the power. And we think the same principle must apply with respect to the other powers enumerated in the section, including the power 'responsibly to direct' other employees. . . . The evidence is that those who retained other men in their respective departments were expected to and did supervise those men, even though supervision did not take much of their time, with the result that most of their time was spent in routine production work. . ."

The Court below in the instant case has disregarded the *Ohio Power Company* and *Leland Gifford* cases.

It will be noted in the instant matter that, after discussing the nature of the various duties performed by Petitioner's assistant foremen, and after pointing out that a great number of them were, in the Board's opinion, duties customarily exercised by more skilled employees over less skilled employees, and without disputing the fact of the delegation of managerial and supervisory authority and the express notification to the assistant supervisor and their subordinates of the fact that such delegation had been made, the Board while ignoring the fact that the subject machine printers were unskilled averted to its "frequency of exercise" theory and its "not generally done in the industry" theory, as the ultimate basis for determining whether or not any of the tests for "supervisor" status set out in Section 2(11) had been met.

It is uncontradicted in the Record that the Petitioner actually delegated supervisory authority, informed and instructed each of its assistant foremen and their subordinates that the assistant foremen had the responsibility to exercise duties and authority (which admittedly constitutes supervisory authority) and that it reiterated these instructions during the fourteen or more years prior to the 1965 Representation Petition and for the several years thereafter.

The authority thus delegated to the assistant foremen was derived from Petitioner, which had an absolute right to delegate portions of its managerial and supervisory authority and vest such authority in its assistant foremen; and by such delegation and vesting of such authority made the assistant foremen "supervisors" within the statutory definition prescribed by Congress in Sec. 2(11) of the Act, as amended.

The Court below affirmed the Board's action in refusing to honor the unimpeached evidence as to the delegation of authority, as well as the Board's refusal to give weight to other undisputed testimony, which it acknowledged was in the Record, that the delegated supervisory authority and responsibility had in fact been exercised by all of the Petitioner's assistant foremen. Moreover, the Court below enforced the Board's Order which, for all practical purposes, makes any determination by Petitioner as to the feasibility and desirability of delegating certain supervisory authority to its printers, be they skilled or unskilled, *subject to the Board's ultimate determination of whether or not, in the Board's judgment, such delegation is a feasible or practical way for the Petitioner to operate its business.* The Decision thus makes it impossible for an Employer to assign supervisory duties and responsibilities.

The substance of the Board's finding is that since the men did not frequently *exercise* the supervisory authority granted to them, and since the remainder of the industry did not and does not follow such procedure, they could not be supervisors. This is in complete contravention and circumvention of the law as set out in the *Ohio Power Company* case (supra) which is the leading case on this subject.

For the reason that the Board has thus continued to circumvent the clear mandate and provision of the Act in connection with the determination of supervisory status, it is submitted that this Court should accept this case, and grant the Writ and decree the proper scope and application of Section 2(11) of the Act. This Court has not previously reviewed a case involving the interpretation of Section 2(11) of the Act in this regard, although it has denied certiorari in a number of cases, including the Decision of the Sixth Circuit in *Ohio Power Company* v. *NLRB,* supra, which involved the actual point here involved, and there the Sixth Circuit expressly and specifically rejected the theory upon which the Board and the Court below here have predicated the Decision in the instant matter.

The Court below determined that the Board's Order was supported by "substantial evidence in the Record considered as a whole." Such a determination, we submit, should not be allowed to stand in an instance where the Record itself proves there was no such supporting evidence. It is well to note that the Board in its Decision and Direction of Election *in this case never made a specific finding that supervisory authority within the meaning of the Act did not exist.* The Board's decision is based on the practice of the *industry in general, which admit-*

tedly is not followed at American Finishing Company. Such evidence is not substantial evidence to support the Board's findings. There is no substantial evidence to support the Board's findings and such findings are not binding unless they are supported by substantial evidence in the Record considered as a whole (Sec. 10(e) of the Act, 29 USC (160) (e)) (*Universal Camera* v. *NLRB*, 340 U.S. 488).

CONCLUSION

For the reasons stated, it is respectfully submitted that this Petition for Certiorari should be granted.

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